Baker Concrete Construction, Inc. *and* South Florida Carpenters Regional Council, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 12–CA–22027–1

April 19, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 10, 2003, Administrative Law Judge George Carson II issued the attached decision. The General Counsel filed exceptions, a supporting brief, and a reply brief. The Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent did not violate Section 8(a)(1) of the Act by interrogating employees about their protected concerted and/or union activities or by threatening them with discharge. With respect to the alleged threat of unspecified reprisals for engaging in union and/or protected concerted activity, it appears, although it is not free from doubt, that the judge credited Marta DeLeon's testimony that the Respondent's superintendent, Keith Kelly, told her at a safety meeting on December 28, 2001, "stay away all these people; because if you no stay away these people, you have trouble [sic]."

The General Counsel does not allege that the Kelly statement constituted *an order* that DeLeon stay away from "these people." Rather, the General Counsel asserts that the Respondent was threatening reprisals ["trouble"] if DeLeon did not stay away from "these people." We assume arguendo that "these people" referred to union officials or supporters. However, it is far from clear that Kelly was saying that the Respondent would be the source of that trouble.

Nor has the General Counsel established that an employee would reasonably construe the statement as meaning that the Respondent would be the source of such trouble. Accordingly, we find that the statement was not a threat of reprisal in violation of Section 8(a)(1), and it was not an indicium of antiunion animus on the part of the Respondent.[2]

We find no merit in the General Counsel's argument that the judge should have found that Supervisor John Laibang unlawfully informed employee Wilder DeLeon that he would fire anyone he saw eating before lunchtime. The complaint contained no such allegation. Moreover, when the parties stipulated to Laibang's supervisory status, they also stipulated that no unfair labor practice was being attributed to him. In these circumstances, we agree with the Respondent that it would be improper to find a violation based on Laibang's statement.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. April 19, 2004

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

John F. King, Esq., for the General Counsel.
Andrew S. Hament and *A. Anthony Giovanoli, Esqs.*, for the Respondent.
George S. Aude, Esq., for the Charging Party.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge, for the reasons stated in his decision, that the Respondent's layoff of six employees did not violate Sec. 8(a)(3), because the Respondent showed that it would have laid them off because of their lack of skills even in the absence of their union or protected concerted activity. There were no exceptions filed to the judge's finding that the General Counsel had established a prima facie case. See *Wright Line*, 251 NLRB 1083 (1980).

[2] Member Liebman disagrees that Kelly's statement was "much too vague" as the judge found to constitute an unlawful threat of unspecified reprisal, or "far from clear" as my colleagues find. In her view, Kelly sufficiently conveyed his annoyance with the Union (and the agitation for a break) and his statement had a reasonable tendency to coerce DeLeon in her exercise of Sec. 7 rights. Indeed, the judge himself states that Kelly was upset with DeLeon because she had raised the issue of a break at a December 28 safety meeting; that he "immediately confronted her, cursed the Union, to which he incorrectly attributed the request for a break," and told her, "the only person who spoke at the meeting, to 'stay away' from 'these people' or she would 'have trouble.'" Further, as the judge describes, there were about 40 employees at the meeting, and from 10 to 25 supported her suggestion for a break. Kelly's message to M. DeLeon seems clear: stay away from these people agitating for a break (either the Union or the 10–25 at the meeting) or she would be in trouble with him, or with management in general. Ironically, the judge himself, in analyzing the discharge allegations, found that Kelly's statement established animus.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Miami, Florida, on December 4 and 5, 2002. The charge, filed on January 18, 2002, was amended on February 25, April 24, May 31, and June 25, 2002. The complaint issued on June 27, 2002. The complaint, as amended at the hearing, alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by interrogating and threatening employees and violated Section 8(a)(1) and (3) of the Act by laying off and/or discharging six employees because of their protected concerted and union activities. The Respondent's answer admits that it discharged the six employees but denies that it violated the Act. I find that the evidence does not establish that the Respondent violated the Act.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

The Respondent, Baker Concrete Construction, Inc., the Company, is a corporation engaged in the building and construction industry as a general contractor at various locations including its jobsite at the Miami International Airport, Miami, Florida. During the past 12 months, the Company purchased and received at its Miami jobsite goods and materials valued in excess of $50,000 directly from points located outside the State of Florida. The Company admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that South Florida Carpenters Regional Council, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The case involves the termination of six alleged discriminates from the Company's jobsite at the Miami International Airport. General Superintendent Larry Mitchell was in charge of all work at the Miami International Airport. Work is performed on the site inside the airport perimeter and also in an area outside the airport perimeter that is referred to as the yard. Keith Kelly, who was classified as a superintendent, reported to Mitchell. General Foreman Jose Estrada, like Kelly, reported directly to Mitchell.

All of the six alleged discriminates were hired in mid-December 2001, and all of them were terminated on January 4, 2002.[2] The Company does not give employees a formal morning break period. On or about December 20 or 21, employee Marta DeLeon, who was a security employee and who was not terminated, spoke at lunchbreak with a group of employees that included five of the six alleged discriminatees about seeking a formal 15-minute morning break. She stated that she would do so at a safety meeting that was to be held on December 28 and asked for their support. On December 28, after Project Safety Manager John Williams made his presentation regarding safety, Superintendent Keith Kelly asked if there were any questions. Marta DeLeon asked about a break. A number of employees nodded approval, raised their hands in a show of support, or murmured. Kelly responded to Marta DeLeon. Testimony varies regarding what he said. There is also conflicting testimony relating the signing of a list by those employees who desired a formal 15-minute break.

The sixth alleged discriminatee, Wilder DeLeon, was not present in the group on December 20 or 21, nor was he present at the safety meeting. Although Wilder DeLeon and Marta DeLeon are husband and wife, marital status is not sought on the Company's employment application and neither disclosed this fact. When not stating their full names, this decision will refer to Wilder DeLeon as W. DeLeon and to Marta DeLeon as M. DeLeon.

The Company admits that it discharged the alleged discriminatees and contends that it did so because of their inability to perform the work they were assigned. It denies that they were discharged because of union activity or protected concerted ctivity.

B. Facts

The Company hires by word of mouth. Alleged discriminatees Oscar Cabrera and Carlos Dinarte learned that the Company was going to begin work at Miami International Airport from Rene Ramos. Cabrera knew Ramos when they both worked for the Company on a job at the Fort Lauderdale Airport. General Foreman Estrada had been a foreman at that jobsite before coming to the Miami International Airport in November 2001 as General Foreman, but he did not know Cabrera. Ramos had been Dinarte's foreman at a different company. Alleged discriminatees Carlos Montero and Wilder DeLeon both heard of the job from friends. Alleged discriminatee Cantalicio Bustillo did not testify regarding how he heard about the job. Alleged discriminatee Juan Jose Lopez-Garcia did not appear as a witness.

Oscar Cabrera and Jose Montero had worked as carpenters for 10 years and had been members of the Union for 5 years when they were hired. Cantalicio Bustillo testified that he had worked as a carpenter for 5 years and had been a member of the Union for 4 or 5 years. Despite this, he applied for a job as a laborer. Wilder DeLeon became a carpenter in 1990 and joined the Union in 1999. The record does not reflect whether Cabrera and Montero were certified as journeymen. W. DeLeon testified that he was "certified," but he did not go through the Union's apprenticeship program. Carlos Dinarte was not a member of the Union. He had worked for the Company on a job at the Dolphin Mall for over a year, from late 1999 until March 2001. There is no evidence that alleged discriminatee Lopez-Garcia was a union member.

Both General Superintendent Mitchell and General Foreman Estrada had formerly been members of a Carpenters Union. Mitchell had been a member of a local in Fort Worth, Texas, for 4 or 5 years in the 1970s. Estrada had been a member of a local in Orlando, Florida, and worked on a union job at Cape Canaveral in 1998. He has a carpenters' union sticker on the back of his hardhat.

Dale Bretting, an engineer, coordinated the Company's hiring process. General Superintendent Larry Mitchell explained that the Company would determine its manpower needs and

[1] GC Exh. 2, submitted after the close of the hearing pursuant to my order at the hearing, is received.

[2] All dates in December are in 2001 and all dates in January are in 2002 unless otherwise indicated.

then canvass the applicants who would gather at the jobsite. "They would raise their hands and tell us they were carpenters or laborers, whichever one we was hiring." Bretting would read over the applications and fill the available positions. According to Mitchell, the Company would then "put them to work, and give them a try, see how they worked." Estrada reiterated this, explaining that they were "just hiring people who was showing up . . . We did not know their quality of work."

On the day that Cabrera applied, he filled out paperwork and took a drug test. The following day he attended a security and safety briefing. He began work the next day. On the day Dinarte applied, he filled out paperwork and took a drug test. He did not mention a safety or security briefing and recalls beginning work the following day. Montero recalled beginning work the day that he applied. Neither Bustillo nor Wilder DeLeon were questioned regarding how long after they applied they actually began work. The applications of all alleged discriminatees, except that of Bustillo, are dated December 13. Bustillo's application is dated December 11.

General Foreman Estrada explained that the construction at the Miami International Airport was complicated; there were slopes and ramps that were "different than most buildings." Employees were dealing with different thicknesses of slabs and depths of beams. The carpentry work was "not square, it's on an angle."

At least a week before January 4, Estrada informed Mitchell that he had some carpenters that he needed to get rid of because they were not able to perform the carpentry work needed on the job and that he "was not satisfied with their work." According to Mitchell, Estrada did not "like doing his work two or three times. He likes it done right and get away from it." Estrada identified the employees he wanted to release and Mitchell told him that he had to keep them even if that meant assigning them laborers' jobs, "because it would take too long to get other people in to replace them." Estrada also noted that Dale Bretting said that he did not have time to take the employees off the site. General Superintendent Mitchell confirmed that he told Estrada that "we had to wait till we could get other people in before we could let anybody go," and it was upon Mitchell's order that the employees were actually terminated. Mitchell normally meets with his foremen in the morning, just as work is beginning. Although neither Estrada nor Mitchell was able to place the exact date or time of their conversation, Estrada placed it at least a week before the terminations.

Employees were not given a formal morning break, but did have a formal lunch break. At lunch on December 20 or 21, a group of employees that included all alleged discriminatees, except for Wilder DeLeon who was working in the yard, engaged in a discussion relating to a morning break. Although each alleged discriminatee placed himself in that discussion, each omitted the name of at least one of the other discriminatees as being present and Dinarte named employee lvo Saldivar as being present. Other employees who were not named were also present. According to employee Marta DeLeon, the issue of a morning break arose because the employees wanted "to eat something in the morning." Although M. DeLeon, who was a security employee and not a member of the Carpenters Union, recalls stating "the Union will give it [a 15-minute break] to them," no employee corroborated that testimony. All witnesses who testified regarding this conversation confirmed that M. DeLeon stated that she intended to raise the issue of a morning break at a safety meeting scheduled for December 28 and that she asked if they would support her. All committed to do so. Although Dinarte testified that he observed General Foreman Estrada walk by, no other participant in the discussion mentioned seeing him. Even if he did walk by, there is no probative evidence that Estrada or any other supervisor heard or was aware of the nature of the employees' discussion.

On December 28, after Project Safety Manager John Williams completed his safety presentation, Superintendent Keith Kelly asked if there were any questions. M. DeLeon asked Kelly "if he was going to give us a 15 minute break" and, according to her, Kelly said, "Bullshit." M. DeLeon recalls that "all the workers shook their heads supporting me that they wanted the fifteen minutes." According to M. DeLeon, Kelly then directed General Foreman Jose Estrada "to get a piece of paper, and write down the name[s] of the people that wanted a 15 minute break." She testified that she followed Estrada and asked him why he had to write down the names. Estrada purportedly replied, "[B]ecause I think they want to know who wants the fifteen minutes so they can fire them." M. DeLeon testified that Kelly motioned with his index finger for her to approach him. She did so. According to M. DeLeon, Kelly stated to her, in English, "[F]–k the Union. The 15-minute break is coming from the f–king Union. This is all bullshit. And listen, Friday I have good layoff for these people, for no come back no more definite." When repeating this testimony, M. DeLeon phrased the layoff comment as "Friday I give you good layoff, definite," and added that he told her to "stay away all these people, because if you no stay away these people, you have trouble. Friday Layoff. Definite." In a pretrial affidavit, DeLeon did not mention Kelly's purported direction that Estrada make a list and she placed the conversation with Estrada as occurring when she was returning to work. Despite purportedly hearing Estrada refer to firing, M. DeLeon claims that she signed the list. She observed others, more than five, sign the list, but she did not name any of the alleged discriminatees as having signed the list.

Marta DeLeon testified that, at the point she had the foregoing converstion with Kelly, she liked him and believed that he made the foregoing statement to her because he wanted a closer relationship with her. At some point after the employees were terminated on January 4, M. DeLeon asked Kelly why the employees had been laid off, and he replied that he "had gotten rid of that shit and that there were other people waiting in the yard for work." Also, after the layoff, M. DeLeon testified that Kelly made unwanted sexual advances towards her. She reported this to Estrada who reported Kelly's conduct to Safety Manager John Williams. Thereafter, management officials from company headquarters in Ohio became involved. M. DeLeon was terminated on February 27, 2002. Kelly's employment ceased in May 2002, and the record does not reflect the circumstances of his leaving. M. DeLeon has filed charges with the Equal Employment Opportunity Commission relating to her termination. There is no allegation relating to discrimination against M. DeLeon because of her actions on December 28.

Bustillo recalls that Kelly responded to M. DeLeon stating that "they would consider it in the future . . . [and] they could carry a bag with something . . . and eat, and just continue working and eat, that he had no objection to that, but that, you know, there were no set time for breaks." Bustillo observed that 15 or 20 employees raised their hands "as a sign of support" when M. DeLeon asked about the 15-minute break. He recalled that, as the meeting ended, "they wrote several names" on a list and

that he assumed his name was on the list. Although Bustillo recalled that the individual making the list was a "leadman foreman" named Jose, he twice testified specifically that it was not General Foreman Jose Estrada. Estrada was present as the Respondent's representative at counsel's table when Bustillo testified, and Bustillo knew who Estrada was. Estrada denied having anything to do with a list, and Bustillo's testimony is consistent with that denial. Bustillo also recalled M. DeLeon asking the unidentified leadman foreman "what was the list," and that the individual responded in Spanish. The official interpreter at the hearing translated Bustillo's testimony of that response as, "[T]hat's for the people that are asking for the break." Counsel for the Charging Party stated that Bustillo had used the Spanish words "se va" in his answer which, he asserted, would translate "are going" or "are going to be going." Regardless of what the unidentified leadman foreman said, there is no allegation or evidence that he was a supervisor.

Montero recalled that Kelly stated that he "didn't like the idea of the fifteen minutes," but that he then said that "everyone that wants the fifteen minutes, sign this list of paper that they pulled out there." The paper was "laying on top of something that was there." Montero recalls no supervisors standing near the list. He signed the list and, when doing so, observed about 10 names on the list. He did not observe anyone else as they were signing the list.

Dinarte attributed the safety briefing to Kelly. Notwithstanding that misidentification, when Kelly asked if there were any questions, he recalls that M. DeLeon asked, "If we can get the fifteen minutes, all of the workers need it." He observed that 12 to 15 people raised their hands in support of the request including Montero, Cabrera, Bustillo and lvo Saldivar, who is not alleged as a discriminatee and who was not terminated. In testimony uncorroborated by any other witness, Dinarte asserted that Marta DeLeon "showed her shirt," apparently by unzipping the jacket she was wearing, and displaying a shirt bearing the Carpenters Union logo. According to Dinarte, Kelly said, "F–k [the] Union" and "Bullshit Union." He called M. DeLeon aside and announced that that "the meeting was finished and that everyone go back to work." Dinarte observed Kelly speaking with M. DeLeon on the side "where they have the blueprints." As Dinarte was about to start working, he testified that Estrada approached him carrying a pad and asked if he wanted the 15 minutes. Dinarte replied that he did and he "signed that [pad]."

Cabrera recalls that, when M. DeLeon spoke, Montero, Bustillo, Dinarte, Lopez-Garcia, he, and other employees, a total of 10 to 12, supported her by raising their hands. According to Cabrera, Kelly thereafter said "a bad word." Upon being asked what the bad word was he answered, "something like fuck the Union, something like that." Cabrera acknowledged that, in a pretrial affidavit, when describing Kelly's response he stated, "Keith [Kelly] said that they would not be able to give us the fifteen minute breaks. He said that maybe in the future we might get fifteen minute breaks, but at the moment, no. Keith was speaking in English . . . [An interpreter] translated into Spanish. Keith said that the meeting was over." Cabrera testified "that other things . . . are the truth," noting that the interpreter would not translate a bad word and thereby implicitly suggesting that the affidavit did not address anything he heard in English that was not translated. When asked whether Kelly said anything else, Cabrera answered, "No, only he just said to go back to work." Thus, Cabrera, like Dinarte, did not testify that Kelly said anything about a list at the meeting. Cabrera testified that Estrada, although not saying anything, was going around with a list "to sign for about the 15 minutes" and that he, Cabrera, signed it. When he did so, he observed about 10 or 12 names on the list but did not look to see who had signed.

The Company presented employees Albert Camps, Jose Meza, Jose Gomez, and Mario Monge, all of whom were present at the meeting on December 28. None of these employees heard Kelly use any improper language, observed any employees raising their hands in support of M. DeLeon's comments, or knew anything about any list. Gomez recalled that, when M. DeLeon raised the issue of a break, there was a "murmur" but no one said anything.

M. DeLeon did not testify to wearing a shirt with a union logo nor did she attribute any statement relating to the Union to Kelly in the meeting. No witness other than Dinarte testified to M. DeLeon "showing her shirt," and I do not credit that testimony. Cabrera, who testified through an interpreter, thought that the bad word he attributed to Kelly was "something like fuck the Union, something like that." No witnesses other than Dinarte and Cabrera attributed any statement relating to the Union being made in the meeting by Kelly. I do not credit their testimony in that regard. Whether Kelly reacted to the request for a 15-minute break by saying "bullshit" is immaterial. No threat is alleged to have accompanied the word.

M. DeLeon was the only witness who testified that Kelly directed Estrada to make a list of employees who wanted a 15-minute break. Montero recalls that Kelly pulled out a piece of paper and invited any who wanted to sign to do so. Bustillo placed the list in the hands of a leadman foreman, not Estrada. He overheard M. DeLeon speak with that individual. M. DeLeon's pretrial affidavit makes no mention of Kelly's purported direction to Estrada and places her alleged conversation with him as occurring when she was returning to work, which presumably would have been after her conversation with Kelly. That is consistent with Dinarte's testimony that Kelly called M. DeLeon aside just before dismissing the meeting. Estrada denied threatening employees with discharge or layoff or having anything to do with any list. Bustillo overheard the conversation between M. DeLeon and the leadman foreman named Jose. Although there is some question regarding the translation of what the leadman foreman, who was not Estrada, said, M. DeLeon testified to only one conversation relating to the list, the purported conversation in which she attributed the "so they can fire them" statement to Estrada. M. DeLeon, although attributing the discharge threat to Estrada, claimed that she signed the list. I find it incomprehensible that M. DeLeon would sign a list immediately after having supposedly being told that employees who signed were going to be fired. I do not credit M. DeLeon's uncorroborated testimony that Estrada was directed to make a list and that she spoke to him. I find that she spoke to the leadman foreman and that Bustillo overheard that conversation. I find further that she did not perceive whatever comment the leadman foreman made to be a threat since she signed the list. I credit Estrada that he had nothing to do with any list.

In crediting Estrada's denial that he had anything to do with a list, I do not credit Dinarte's testimony that Estrada approached him and asked whether he wanted to sign the list. I have little confidence in Dinarte's recollection of observations to which no other employee testified or his identification of individuals as reflected in his attribution of the presentation of

the safety briefing to Kelly rather than Safety Manager Williams. Similarly, I do not credit the testimony of Cabrera that it was Estrada, who Cabrera testified did not speak, who was carrying the list that he signed.

On January 4, a week after the foregoing meeting, the alleged discriminatees were terminated. Estrada recalled no employee asking why he was being terminated. Only Dinarte contradicts this testimony, testifying that he did ask Estrada why he was being let go and was told to shut up. Whether the transaction occurred as reported by Dinarte is not material. Bustillo recalls that Lopez-Garcia, who was acting as translator for the employees, asked and "the answer that they gave him was that there was a reduction in personnel." Montero asked Richard Wendell, his immediate foreman, why he was being let go and Wendell replied, "we're letting go of people, but we're going to give jobs within two weeks." As Montero and the others who had been separated were being processed out, Montero encountered Kelly and asked why he was being terminated. Kelly replied that "he had no control over that." Wilder DeLeon, who was working in the yard, was told by his foreman, John Laibang, he had to let W. DeLeon and "the other guy" go "because they told me that we had too many people."

Estrada explained why he had recommended to Mitchell that each of the alleged discriminatees be terminated.

Estrada recommended that Bustillo, who had applied and been hired as a laborer, be terminated because he was "very slow at moving, and he would talk to people too much." Estrada did not recall the names of the employees with whom he saw Bustillo talking. Although not hired as a carpenter, Bustillo testified that, on an occasion upon which Estrada directed him to help with decking, that he "took advantage of the opportunity to let him [Estrada] know that I [Bustillo] was a carpenter. So I pulled out my union card and I showed it to him." When asked whether Estrada reacted in any way when he did this, Bustillo answered, "He ignored it."

Oscar Cabrera was initially assigned do deck work. Decking involves setting aluminum on top of the scaffold and then cutting plywood to fit and placing it on top of the aluminum. Estrada observed that Cabrera could not do the work, and he assigned him to setting beam forms and building scaffolds. Setting beam forms requires constructing forms with the proper dimensions as set by engineering and then placing kickers properly "so that the forms will hold the pressure of the concrete." Estrada recalled speaking with Cabrera several times about his work. He noted one occasion upon which he told him the measurement for a beam side and then observed that Cabrera "was counting the lines on the tape measure. To me, that is not a carpenter at all."

Cabrera testified that, after December 28, Estrada would not speak to him, that there was "a dramatic, great change with respect to me" in that Estrada would ignore him. On cross examination, Cabrera admitted that, prior to December 28, he spoke with Estrada only "occasionally" and, after December 28, Estrada "would hardly speak to me." Cabrera denied that Estrada had criticized his work before December 28 but that, after December 28, Estrada would speak in plurals, stating, "All these carpenters are no good." Regarding criticism of Cabrera's work, Dinarte initially denied hearing Estrada tell Cabrera that the work he was doing was no good and reassigned him to another job. On redirect examination, Dinarte effectively admitted Estrada's criticism of Cabrera when he testified that Cabrera's reassignment occurred after December 28. On January 3, Cabrera was injured on the job. Thereafter he filed a workers compensation claim. That claim has been settled. The settlement states: "Employee has alleged that his employment was terminated on January 4th, 2002 by Employer, due to employee's allegation of an injury occurring during the course of his employment." The settlement specifically exempts any potential liability resulting from this proceeding from the scope of the settlement.

Estrada stated that Dinarte was not able to satisfy him with his carpentry, that he was not accurate with his measurements and did not "put the kickers right on the forms." Dinarte denied having his work or pace of work criticized, but did admit that Estrada reassigned him to the job of "pulling jacks." From Dinarte's description, a jack is critical to the construction process since it is used "to hold the walls." According to Dinarte, pulling jacks is a two person laborers' job, and he protested the assignment, stating that he was a carpenter. He recalls that Estrada told him to shut up because "he was my boss." Thereafter, Dinarte testified that he heard Estrada saying that "all the carpenters were . . . shit carpenters." Dinarte placed his reassignment contemporaneously with his signing the list favoring a 15-minute break. The reassignment is not alleged as an unfair labor practice. At some point after his reassignment, Dinarte began working with Cabrera. On January 3, Dinarte gave a written statement supporting Cabrera's version of his accident. On January 4, Dinarte testified that he tripped and fell, injuring his leg and back. Cabrera was a witness. Dinarte reported his fall to Estrada who, according to Dinarte, ignored him and assigned him to work with a foreman identified as Pablo who assigned him light duty for the remainder of the day.

Dinarte was terminated that afternoon and filed a workers' compensation claim alleging that he was terminated for reporting an accident.

Estrada testified that Carlos Montero was unable to perform decking work and that he, therefore, limited Montero to scaffolding work for the duration of his employment. Montero effectively acknowledged that Estrada was dissatisfied with his performance, testifying that he showed Estrada his union card in an effort to establish that he was competent because Estrada "thought that we didn't know how to work, that we didn't know what we were doing, and I knew what I was doing." When asked if Montero reacted to the presentation of his union card, Montero replied, "No, because . . . he just stayed very calm." In later testimony regarding his work, Montero explained, "A lot of carpenters have different ways of working. I have my ways, and it's like that."

Regarding Wilder DeLeon, Estrada recalls that he gave him "certain measurements for him to cut a form," and that when he checked upon his progress he observed "another carpenter showing him the same thing that I showed him." Estrada asked W. DeLeon why he had sought assistance and he explained that he "did not know what he was doing." W. DeLeon denied that Estrada criticized his work, noting that Estrada "had a bad attitude with the others, but not with me." Notwithstanding the alleged absence of criticism, W. DeLeon acknowledged that after working for Estrada for one day, "the first day inside the field," he thereafter worked in the yard under Foreman John Laibang, referred to as "Papa John," constructing beam bottoms. Although General Superintendent Mitchell acknowledged that it would be unusual for Estrada to recommend the termination of an employee that he did not directly supervise, Estrada explained that he recommended that W. DeLeon be terminated

because the job he was doing in the yard was temporary, that the "carpenters that were in the yard [building beam bottoms], they were going to get transferred . . . to work in the field [i.e., inside the perimeter]" under Estrada's supervision.

DeLeon testified that, on an unspecified date sometime after being assigned to the yard, he wore a T-shirt, presumably a union T-shirt, and that Foreman Laibang asked if he was a member of the Union. W. DeLeon replied affirmatively and also showed him his union card. According to W. DeLeon, Foreman Laibang turned away from him and said "f–k the Union." Although Foreman Laibang had turned away, W. DeLeon testified that he continued to speak, saying to Foreman Laibang that "we all wanted" a 15-minute break and that Foreman Laibang responded that "we were getting paid $19.50, and if he see anybody eating before lunchtime, he was going to fire anybody." Although W. DeLeon testified that he used the word "we," the record does not establish that he was speaking on behalf or anyone other than himself or that there was any basis upon which Foreman Laibang could conclude that W. DeLeon was speaking on behalf of anyone other than himself.

Although Lopez-Garcia did not testify, Estrada was questioned regarding the reason for his termination. He explained that Lopez-Garcia "would talk to people too much," was very slow, and "was not able to do carpentry work."

Cabrera had previously been employed at the Company's Fort Lauderdale Airport jobsite, and Dinarte had been employed at the Dolphin Mall. Estrada explained that, at Fort Lauderdale, the decking was "from precast joist to precast joist, . . . all the same dimensions." At the Miami International Airport, "the depth of the beams was different, . . . [the carpenters] would have to be using the tape measure all day long with different measurements, . . . not just . . . one measurement all the time." General Superintendent Mitchell concurred that the work at the Miami International Airport was more complicated. He noted that, of the three jobs about which there was testimony, the Dolphin Mall, where employee Dinarte had been employed, was the "easiest, because it's slab on grade" and that the Fort Lauderdale job "was basically beam bottoms, beam sides, and the precaster took it from there."

A total of eight employees were terminated on January 4, 2002, the six alleged discriminatees, Enrique Avila who was withdrawn from the complaint at the conclusion of the General Counsel's case, and Anthony E. Coffee who documentary evidence reflects was discharged for substandard work.

Two new carpenters and a laborer were hired on January 7 and three additional carpenters were hired on January 14. Estrada acknowledged that it was possible to process an employee onto the job in a single day; however, the testimony of Cabrera establishes that the normal procedure was completion of paperwork and a drug test on one day and attending a safety and security briefing the next day. The week ending January 4 included New Year's Day, which was observed as a holiday. Counsel for the General Counsel argues that the foregoing hire dates undercut the testimony that the terminations should be delayed a week in order to obtain replacements. I find no significance in the failure of the Company to have succeeded in replacing all of these employees in a single week. The General Counsel's argument might well have merit if the protected conduct had occurred on January 4, but the evidence establishes that the protectred conduct was on December 28. Even if I were to accept the General Counsel's argument that there was "a delay . . . [in the terminations] to cover up the true reasons" for them, the time lapse between the precipitating event and the terminations would be the same. Thus, whether the Company terminated eight employees because of substandard work or, in the case of the six alleged discriminatees, because of conduct protected by the Act, the decision was made on or before December 28. The fact that the Company did not succeed in immediately hiring a full complement of replacement workers proves nothing.

B. Analysis and Concluding Findings

1. The 8(a)(1) allegations

The complaint alleges that General Foreman Estrada, on or about December 28, interrogated employees about their union and/or, protected concerted activities and threatened employees with discharge in retaliation for their union and/or protected concerted activities. There is no evidence of any interrogation. The only witness who attributed a threat of discharge to Estrada was Marta DeLeon and, as discussed above, I have not credited that testimony. I shall recommend that these allegations be dismissed.

Superintendent Kelly is alleged to have, on December 28, interrogated employees, threatened employees with layoff in retaliation for their union and/or protected concerted activities, and threatened employees with unspecified reprisals in retaliation for their engaging in union and/or protected concerted activities. There is no evidence of any interrogation by Kelly. The remaining allegations are dependent upon the testimony of M. DeLeon. According to M. DeLeon, Kelly stated to her, in English, "[F]–k the Union. The 15-minute break is coming from the f–king Union. This is all bullshit. And listen, Friday I have good layoff for these people, for no come back no more definite." In repeating this latter comment, M. DeLeon testified that Kelly said "Friday I give you good layoff, definite," and added "stay away all these people, because if you no stay away these people, you have trouble. Friday. Layoff. Definite." Counsel for the Respondent argues that I should not credit the foregoing testimony. Counsel for the Charging Party argues that I should draw an adverse inference from the failure of the Respondent to present Kelly; however, it is inappropriate to make an adverse inference on the basis of absence of testimony by a person no longer employed by a respondent. *Lancaster-Fairfield Community Hospital*, 303 NLRB 238 fn. 1 (1991). M. DeLeon's testimony that she had a conversation with Kelly is unrebutted.

Counsel for the General Counsel and the Charging Party urge that I find that Kelly stated that he was going to lay off the employees who wanted a 15-minute break the following Friday and that he "confided" his intentions to M. DeLeon because he desired to have a closer relationship with her. The record simply does not support this argument. Nothing was confided. Kelly was upset with M. DeLeon, the employee who had raised the issue of a break. He immediately confronted her, cursed the Union to which he incorrectly attributed the request for a break which would potentially complicate a definite layoff planned for the following Friday, and told M. DeLeon, the only person who spoke at the meeting, to "stay away" from "these people" or she would "have trouble."

When restating her recollection of Kelly's comment regarding a layoff, M. DeLeon omitted any reference to "these people" and specifically repeated, "Friday. Layoff. Definite." There were approximately 40 employees at the meeting and, depending upon the witness, between 10 and 25 of them, from

one quarter to over half of them, indicated support for M. DeLeon's suggestion. If I were to credit M. DeLeon's first version of Kelly's comments, I would have to assume that Kelly was somehow able to identify those employees who expressed support for M. DeLeon, either by nodding, hand raising, or murmuring. Kelly's purported identification of "these people" would have to have included well more that the five alleged discriminatees who were at the meeting. Kelly had no authority over employees supervised by Estrada. His comments were made within 2 or 3 minutes of M. DeLeon's request. His affirmative identification of a date, "Friday. Layoff. Definite," belies a spontaneous reaction to anything that occurred at the meeting. Kelly referred to a definite layoff on Friday. Estrada had informed Mitchell at least a week prior to January 4 that he needed to terminate carpenters who were unable to perform work to his satisfaction. Mitchell told him that he would have to keep them for a while. Mitchell met with his foremen each morning. Thus, consistent with M. DeLeon's second version of his remarks, Kelly cursed the Union, to which he incorrectly attributed the request for the 15-minute break for potentially complicating a planned, i.e., "definite," layoff that had been scheduled for the following Friday. I do not credit M. DeLeon's initial testimony that Kelly referred to "these people" in regard to the layoff. Kelly did not, in a 2-minute interval, calculate a scheme to retain M. DeLeon and delay laying off various employees that he had somehow identified at the meeting. Kelly spontaneously called M. DeLeon, the only employee who had said anything at the meeting forward, cursed the Union, informed M. DeLeon that there was a planned layoff the following Friday, and told M. DeLeon to "stay away" from "these people" or she would "have trouble." I shall recommend that the allegation relating to a threat of layoff be dismissed.

M. DeLeon's testimony that Kelly told her she should "stay away all these people, because if you no stay away these people, you have trouble" is uncontradicted. The complaint alleges that Kelly "threatened employees with unspecified reprisals for engaging in union and/or concerted, protected activities." The generalized reference to "you have trouble" did not indicate in any way that the Respondent rather than other employees or union officials would be the source of the unspecified "trouble." I find the statement "much too vague to support the finding of a threat." *Northern Wire Corp.,* 291 NLRB 727, 729 (1988). There is no evidence of any reprisal against M. DeLeon, and her termination is not alleged as a violation. I shall recommend that this allegation be dismissed.

Regarding the admonition to "stay away . . . [from] these people," counsel for the General Counsel argues that "warning employees to stay away from others who engage in protected concerted activities" violates the Act. Counsel neglects to point out that no such violation is alleged in the complaint. No motion to amend has been made. I shall not find a violation regarding unalleged conduct on the basis of M. DeLeon's less than reliable testimony. See *Gibson Discount Center,* 191 NLRB 622 fn. 3 (1971). In the comment as reported by M. DeLeon, the reference to "these people" is ambiguous. In context it is unclear whether it related to the unidentified employees who had supported her or to unidentified union officials. Although not alleged as a violation, the comment, with its ambiguity, does establish animus towards both union and protected concerted activity.

The complaint further alleges that, in mid-January, Kelly again threatened employees with discharge for engaging in union and/or protected concerted activity. The General Counsel argues that this allegation is established by M. DeLeon's testimony that, after the layoff, she asked Kelly why the employees had been laid off and he replied that he "had gotten rid of that shit and that there were other people waiting in the yard for work." That answer contains no threat. It simply states that the Respondent "got rid of" employees with no mention of the union or protected concerted activity. I shall recommend that this allegation be dismissed.

2. The discharges

The analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), is applicable in dual or mixed motive cases after the General Counsel has established employee union activity, employer knowledge of that activity, animus towards such activity, and adverse action taken against those involved in that activity. Once this showing has been made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Superintendent Kelly's statement that he believed the request for a break was "coming from the Union," although incorrect, followed by his advice that M. DeLeon "stay away . . . [from] these people" establishes animus. Alleged discriminatees Bustillo and Montero had shown their union cards to General Foreman Estrada, and all were present at the December 28 meeting. Wilder DeLeon, although not present at the December 28 meeting, had identified himself as a union member to his supervisor. All three were terminated. Thus, the General Counsel has established a prima facie case that the Respondent discharged those employees because of their union activity in violation of Section 8(a)(3) of the Act.

Although finding that the General Counsel established the elements necessary to establish a prima facie case, thus avoiding dismissal of that aspect of the allegations, the case established is tenuous. There is no evidence that any of the foregoing employees engaged in any union activity other than Bustillo, Montero, and Wilder DeLeon identifying themselves as union members. There is no evidence that Dinarte was a union member. Contrary to a statement the brief of counsel for the General Counsel, there is absolutely no evidence that Dinarte showed a union card to Estrada. Cabrera never identified himself as a union member. Estrada, a former union member himself, did not react in any manner when Bustillo and Montero identified themselves as union members. Although Wilder DeLeon testified that Foreman Laibang did react to his showing him his union card, he did not allege any change in his terms and conditions of his employment following his revelation of union membership. No conduct that violated Section 8(a)(1) of the Act or discrimination contemporaneous with the foregoing disclosures of union affiliation by these three employees is established by the evidence or alleged in the complaint.

The record also establishes protected concerted activity. Employee activity is concerted when it is "engaged in with or on the authority of other employees." *Meyers Industries*, 268 NLRB 493, 497 (1984). A respondent violates Section 8(a)(1) of the Act if, having knowledge of employee concerted activity, a respondent takes adverse employment action that is "motivated by the employee's protected concerted activity." Id. M. DeLeon requested a break and between one quarter and one half of the employees present indicated support for the request by nodding, raising their hands, murmuring, or signing a list.

Logic suggests that no adverse action was predicated upon visual identification. Had this been so, well more than the alleged discriminatees would have been terminated including employee Ivo Saldivar, whom Dinarte identified as being in the discussion on December 21 and whom Dinarte asserted raised his hand at the meeting. Thus, I shall address the purported list about which five of the General Counsel's witnesses testified.

If I assume that a list of employees who wanted the 15-minute break was made, I would, consistent with the testimony of Montero and Cabrera, have to find that the list contained between 10 and 12 names. Wilder DeLeon did not sign the list. Montero signed a list that was not circulated by anyone but contained 10 names, presumably 11 names after he signed it. Cabrera and Dinarte testified that they signed the list. Although I have not credited their testimony that Estrada had a list, I shall assume that they did sign a list. Bustillo believes his name was written down. The General Counsel did not establish that Lopez-Garcia, the alleged discriminatee who did not testify, or Avila and Coffee, the other employees who were terminated, signed the list. Thus, so far as the record shows, only four of the eight employees terminated signed the list and thereby identifed themselves as supporting M. DeLeon's request. Even if Lopez-Garcia, Avila, and Coffee did sign, that list would have included the names of three employees who were not terminated, assuming a list of 10, or five employees who were not terminated, assuming a list of 12. One of those employees was M. DeLeon, the only employee who spoke at the meeting, who signed the list, and who was not terminated.

Counsel for the General Counsel argues that the Respondent did not terminate M. DeLeon because to have discharged the only spokesperson "would have been indefensible." Counsel also notes that such caution would avoid a potential sexual harassment claim. M. DeLeon places Kelley's unwanted advances as occurring after January 4, thus there is no basis for the latter argument. The only evidence of any animus is that expressed by Kelly who did not supervise any of the alleged discriminates and who was not involved in the decision to terminate them. When Montera spoke to Kelly immediately after his termination, Kelly told him that "he had no control over that." The only reaction to the employees' concerted activity established by probative evidence is Kelly's speaking to M. DeLeon, the spokesperson. Counsel for the General Counsel and Charging Party argue that six competent employees, one of whom was not even at the meeting, were terminated for doing nothing more than supporting the request of the only employee who spoke by nodding their heads, raising their hands, or signing a list which, if it existed, contained at least 10 names. I do not agree.

The construction at Miami International Airport was complicated, involving slopes and ramps; it was "different than most buildings." Montero testified, "A lot of carpenters have different ways of working. I have my ways, and it's like that." Mitchell explained that Estrada did not "like doing his work two or three times. He likes it done right." I credit Estrada that he was dissatisfied with the job performance of each of the alleged discriminatees. After working inside the perimeter, W. DeLeon was transferred to the yard before identifying himself as member of the Union. Montero, having been criticized by Estrada, sought to establish his competence by showing Estrada his union card. Dinarte acknowledges hearing Estrada specifically criticize and reassign Cabrera, but asserts this was after December 28. Cabrera testified that Estrada did not talk to him after December 28. If that were true, the criticism would have occurred prior to that date. Although Dinarte, who was not a union member, testified that his assignment to "pulling jacks" was contemporaneous with his signing the list requesting the 15-minute break, the foregoing assignment is not alleged to have been in retaliation for engaging in protected concerted activity. Even assuming that the "different ways of working" to which Montero referred were competent, the individual that the employees had to satisfy was General Foreman Estrada. The record establishes that, in performing work in "different ways," their way rather than Estrada's way, the alleged discriminatees did not satisfy him.

Whether viewed as union activity or protected concerted activity, the crux of this case is whether the adverse employment action taken by the Respondent against the six alleged discriminatees was motivated by their protected conduct. On the basis of this record, I simply cannot find that there is persuasive evidence that any protected conduct in which the alleged discriminatees engaged related in any way, much less was a motivating factor, in the terminations that occurred on January 4. The Respondent's spontaneous reaction to the protected concerted activity was to speak to the employee spokesperson. At that time, the Respondent had already decided to terminate employees who could not perform with the skill necessary for the construction at the Miami International Airport. There is no probative evidence that the Respondent either identified or selected the employees that it terminated on the basis of their union membership or protected concerted activity. Although finding that the General Counsel established a prima facie case with regard to the allegations of discrimination because of union activity and protected concerted activity, I further find that the Respondent has rebutted that case and established that it would have terminated the alleged discriminatees in the absence of any union or protected concerted activity. In view of the foregoing and the entire record, I shall recommend that the 8(a)(1) and (3) allegations relating to the layoff and/or discharge of the alleged discriminatees be dismissed.

CONCLUSIONS OF LAW

The Respondent has not engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 10, 2003

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.